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No. 01-1009

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

Robert May,
Petitioner

v.

Desiree Douglass,
Respondent

On Motion For Discretionary Review
To The Supreme Court of the State of Washington

REPLY TO BRIEF IN OPPOSITION

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4188

February 27, 2001

PARTIES TO THIS PROCEEDING

The names of all parties to this proceeding are contained in the caption of this case. Petitioner is an individual, not a corporate entity.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Fourteenth Amendment of the United States Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) RCW 26.09.260 (Modification of parenting plan or custody decree) provides:

> (2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:
> (d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Reply Introduction

This case concerns the suspension (indefinite termination) of the Petitioner's parental rights. The foundation of this action is the November 14, 2000 Washington superior court order that denied review of that court's May 19, 1997 *sua sponte* order while ordering the further modification of said May 19, 1997 *sua sponte* order. *Douglass v. May*, Order Denying Relief To Father, Dismissing Petition, And Referring Matter To Commissioner For Appointment Of A New GAL, Washington Superior Court No. 94-5-03704-9 SEA (November 14, 2000, unpublished) /Petition for Writ of Certiorari, Appendix p. A-11-A-14. Both the November 14, 2000 court order and the May 19, 1997 court order maintain the suspension of the Petitioner's parental rights.

Washington superior court orders subsequent to November 14, 2000, including Order Appointing Guardian Ad Litem On Behalf of Minor dated February 27, 2001 (Respondent's Brief In Opposition, Appendix A-1), although germane to the merits of this case, have little relevance to this Petition for Writ of Certiorari.

Respondent Misstates Facts

In her Brief in Opposition, Respondent responds to issues beyond the immediate scope of this appeal. In doing so, Respondent misstates facts of the case.

Contrary to the allegations and implications of Respondent, the May 19, 1997 *sua sponte* court action was not the result of intervention by that court into domestic violence or child abuse of any kind at any time. Pursuant to this case's December 1996 "Order

Setting Domestic Modification Case Schedule" issued by superior court, a scheduled Adequate Cause Threshold Hearing for Petition to Modify Parenting Plan Order was heard on May 19, 1997. That May 19, 1997 hearing was not recorded. The narrative filed and accepted for the record by Washington Superior Court is appended to this Reply. *May v. Douglass*, Narrative of Hearing of May 19, 1997 Before Commissioner Kimberly Prochnau (filed October 6, 2000)/Appendix A-62- A-84).

On May 19, 1997, after a hearing of less than thirty minutes that decided eight separate motions, the family law department of Washington superior court opined the case was a "high conflict case." On that basis, using its discretion without substantial evidence and without applying heightened scrutiny, that court *sua sponte* suspended Petitioner's parental rights pending, *inter alia*, the re-appointment of GAL and payment by the Petitioner of GAL retainer fees. *Id.*

Parties were allowed argue court's finding of "high conflict" case; and Petitioner was not allowed to defend against court's *sua sponte* order suspending his and his child's parent-child-family rights. *Id.* Review by superior court was denied. *Douglass v. May*, Order on Civil Motion (June 20, 1997 unpublished) Petition for Writ of Certiorari, Appendix A-20.

There is absolutely no history of domestic violence and no child abuse involved in the case. There exists no history and no reliable records of any kind, including court records, showing, proving, and documenting domestic violence involving the Petitioner. Respondent's allegations and implications concerning domestic violence and Washington superior court's intervention to protect the interests of the child are false, misleading, and cannot be substantiated by the record of this case.

It is not a fact and it is not a matter of lower court record that "Petitioner was dismissed without progress from Veteran's Administration Anger Management Program in Seattle WA in December 1996. Petitioner did not reenter an anger management program again for three years." Brief In Opposition at 2. Petitioner left that Seattle Veterans Affairs (VA) Anger Management Program in December 1996 after participating for nine months because he moved to Tigard, Oregon in December 1996. *See May v. Douglass*, Petition For Writ of Certiorari, Docket No. 01-1009 at p. 1. Petitioner began anew in a VA program in March 1997 to ensure he met the terms of the Parenting Plan Order that allowed increases in his residential schedule with Dominick upon satisfactory progress in said program. *Infra* p. 4; s*ee generally May v. Douglass*, Parenting Plan Final Order (Petition for Writ of Certiorari Appendix A-24 – A-40). Contrary to Respondent's response, the issues now before the Court neither concern abuse nor the terms and conditions of 1995 Parenting Plan Order; and do not directly concern the conditions superior court requires to reinstate Petitioner's parental rights.

REPLY TO RESPONDENT'S ARGUMENT

The primary Question Presented (restated) before this Court remains: May a state appellate court deny review of a superior court order, issued *sua sponte*, that indefinitely suspends the fundamental and protected liberty interests of the care, companionship, and society of the parent-child-family relationship where that court action was based upon solely the *sua sponte* (state-initiated) use of a state court's wide discretionary powers without allowing a review (substantive and procedurally due process) under the heightened scrutiny of the "clear, cogent, and

convincing standard" required by the United States Constitution?

1. The May 19, 1997 Order on Family Law Motion and all subsequent orders of the Washington courts in this case suspend the parent-child-family liberty interests indefinitely. The May 19, 1997 order and all subsequent orders modify the 1995 Parenting Plan Order by suspending the father-child residential schedule and by denying the Petitioner's right to modify the 1995 Parenting Plan Order. These modifications were ordered without request of the parties and without the court meeting the required clear, cogent, and convincing burden of proof.

Because the Parenting Plan Final Order has no provisions that would allow either the guardian ad litem (GAL) or the court to summarily alter the plan except to increase Petitioner residential time with his son, suspension of parental rights and refusal to modify father's schedule are *per se* modifications. The 1995 Parenting Plan Final Order allows only "alterations" increasing father's residential time upon a finding of father satisfactory progresses in Anger Management Therapy (AMT). *May v. Douglass*, Parenting Plan Final Order, Court No. 94-04567-2 (Sept 19, 1995, unpublished)/Petition for Writ of Certiorari, Appendix A-24 – A-40. Petitioner completed AMT in August 2000.

The original court expressly relies on the *In Re Marriage of Lilly* case to deny Petitioner's modification based upon apparently finding Petitioner intransigent concerning the appointment of and use of the GAL. *Douglass and May*, Order on Family Law Motion, Washington Superior Court Nos. 94-3-04567-2 SEA/94-5-03704-9 SEA (May 19, 1997, unpublished) Petition for Writ of Certiorari, Appendix p. A-21-A-23; *see In Re Marriage of Lilly*, 75 Wash.App. 715, 880

P.2d 40 (1994). It then appears that court implicitly relied upon the *Kirshenbaum v. Kirshenbaum* case, *inter alia*, to find it had the authority to suspend Petitioner's parental rights apparently based upon that court's erroneous belief the GAL was required for Petitioner to maintain his parental rights. *See generally Kirshenbaum v. Kirshenbaum*, 84 Wash.App. 778, 929 P.2d 1204 (1997)

Unlike the parenting plan in the *Kirshenbaum* case, the parenting plan in the instant case provided no implied or expressed means to "alter" it except to allow for increases in father parenting time and allow modifications based upon the parties' major residential changes. *See generally May v. Douglass*, Parenting Plan Final Order *supra* at Petition for Writ of Certiorari, Appendix A-24 – A-40. Respondent errs to suggest the suspension of parent-child-family liberty interests is not a modification of the Parenting Plan Final Order.

2. The contempt of court finding is not the issue in this case. That finding is not the basis for the indefinite suspension of Petitioner's parental rights. Washington statute requires two findings of contempt within three years before it may suspend a parent's liberty interest in the upbringing of his child.

> RCW 26.09.260(2)(d):
> (2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:
> (d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of

custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

There was only one finding of contempt of court in the entire case. Should the original court have relied upon contempt to issue its suspension of parental rights order, it would have violated Washington law and the protections provided by the 14th Amendment.

"Custody and visitation privileges are not to be used to penalize or reward parents for their conduct." *Marriage of Cabalquinto*, 100 Wash.2d 235, 329, 669 p.2d 886 (1983), *Schuster v. Schuster*, 90 Wash.2d 626, 585 P.2d 130, 131 (1978), *Andersen v. Andersen*, 75 Wash.2d 779, 781, 453 P.2d 856 (1969), *Mailfait v. Mailfait*, 54 Wash.2d 413, 418, 341 P.2d 154 (1959).

Under contempt of court and under "high conflict" case theory, Washington courts may not suspend the Petitioner's parental rights without meeting the heightened "clear, cogent, and convincing" evidence standard scrutiny. Before a Washington court may deprive a natural parent of the care, custody, and control of his minor child, the facts supporting such deprivation must 'clearly show the welfare of the child will be substantially subserved by such action.' *In the Welfare of Sego*, 82 Wash.2d 736, 738, 513 P.2d 831 (1973). To deprive a natural parent of the care, control, and custody of his minor child, the court must meet (1) standard of proof that is clear cogent and convincing to support such an order and (2) there must be substantial evidence to support the court's order. *See Id.* at 738-739.

"In a parental rights termination proceedings, the private interest affect is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring the standard is comparatively light. Evaluation of the *Eldridge* factors compels the conclusion that the use of

a "fair preponderance of evidence" standard in such proceedings is inconsistent with due process. *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S.Ct. 1388, 1398, 71 L.Ed.2d 599; *see Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

If contempt of court were the issue, Petitioner's ability to cure the May 19, 1997 order now is impossible. The cure conditions were harshened and modified on January 28, 2000, February 25, 2000, June 2000, November 14, 2000 and February 27, 2001. Each modification subsequent to August 1997 changed a condition to cure the suspension sanction without a good cause hearing and without meeting the required burden of proof to continue to enforce termination of Petitioner's parental rights.

In this case, the original court suspended parental rights using its wide discretionary powers without using the required heightened substantial evidence standard required for Due Process by the United States Constitution before parental rights can be terminated for *any period of time*. Contrary to the Respondent's allegations and implications, there existed no exigent circumstances and no exigent child safety that would allow use of discretionary powers.

3. Washington Courts have absolutely no basis to suspend Petitioner's parental rights; and absolutely no basis to deprive parent-child-family of their protected liberty interests. Washington courts did not meet the heightened standard of proof to order suspension of Petitioner's liberty interest. The court's use of its wide discretionary powers without meeting the clear cogent and convincing standard to support such an order and without substantial evidence to support the court's order violates the heightened due process protections of the 14th Amendment. U.S.C. Const.Amend. 14. The

appellate courts' refusal to take review impermissible sanctions the Due Process Clause violations.

4. Petitioner's Motion for Discretionary Review by the Washington Court of Appeals of the May 19, 1997 order founded upon the denial of review and denial parental rights reinstatement via the November 14, 2000 order is proper. The superior court's actions met the standards for review under Washington Rules for Appellate Procedures (RAP) 2.2 and 2.3. As the November 14, 2000 superior court "committed an obvious error which renders further proceedings useless," Washington appellate courts may take review of the case. RAP 2.3(b)(1). When superior court continued termination of Petitioner's parental rights without allowing a hearing and then ordered the May 19, 1997 order modified *sua sponte* without hearing, it clearly failed to comport with proper judicial procedures. That court failed to meet the heightened burden of proof required of due process for the continued termination of Petitioner's parental rights. As that November 14, 2000 court commanded, without hearing and without full review, the sixth modification of the *ultra vires* May 19, 1997 order based upon *res judicata*, that court improperly denies Petitioner and his children protected family liberty interests. Such action implies any further proceedings are useless. RAP 2.3(b)(1) allows appellate review. That court substantially limited the freedom of Petitioner and his children by denying reinstatement of parental-family rights and by refusing judicial review before implementing harsher conditions to cure suspension. RAP 2.3(b)(2). Parental rights termination hearing requires a heightened evidence scrutiny and clear, cogent, and convincing" good cause. Superior court "so far departed from the accepted and usual course of judicial proceedings, as to call for review by appellate court." RAP 2.3(b)(3). The Petitioner has never been

afforded a proper hearing on the matters of the termination of his parental rights and termination of his children family rights. This is clear and probable error by superior court. Appellate review is again mandated under RAP 2.3(b)(2). Based upon November 14, 2000 court action, this case met RAP requirements for discretionary and direct appellate review.

5. Petitioner's Motion for Discretionary Review by the Washington Supreme Court of the May 19, 1997 order has the same requirements for the Court of Appeals. *Supra* paragraph 4 above.

6. This case is within the jurisdiction of this Court. The issues before the Court involve fundamental liberty rights of family, which are protected by the United States Constitution. The constitutional issues were timely raised in all Washington forums. Washington courts, relying on its relevant case law improperly and inappropriately uses (abuses) its wide discretionary powers in family law matters to suspend parental-child-family liberty interests without allowing parties the heightened scrutiny required by the United States Constitution. *Supra* paragraphs 1 and 2 above.

SUMMARY AND CONCLUSION

The essential issue before this Court remains the protected, fundamental liberty interests of the parent and his child and their family should not and cannot be properly terminated for any length of time by state court-initiated action, unless that state court based such termination or suspension upon proper procedural and substantive due process and "clear, cogent, and convincing" evidence among other heightened protection requirements. In this case, the state court did not have any substantial basis for

suspension and could not make a proper finding to suspend or terminate the fundamental rights to family and society between the Petitioner and his youngest child and their family. The state court did not meet the burden necessary to deprive Petitioner, his youngest child, and their family of care, custody, and companionship of one another.

The original *sua sponte* action to suspend Petitioner's parental-child rights remains beyond the authority of the family law department of that superior court. All subsequent court actions fail to meet the required heightened standard of required by the United States Constitution of "clear, cogent, and convincing" evidence to sustain the indefinite suspension of parent's and child's liberty interests.

Where Washington Courts do not have the authority and right to deprive a parent and his child of fundamental liberty interests, the failure of the Washington appellate courts to take review further undermines the protection of the fundamental and heightened liberty interests involved here.

The Washington Court of Appeals and the Washington Supreme Court refused to allow discretionary review of the *ultra vires* superior order that effectively, indefinitely deprives Petitioner, his youngest child, and their family of in violation of the Due Process Clause of 14th Amendment. Those decisions sanctify actions that stand in conflict with decisions entered by the United States Supreme Court.

Washington appellate courts do not have the discretion not to review matters concerning the parental rights of Petitioner where its lower courts indefinitely suspended said rights without good cause, without basis, and without meeting the heightened scrutiny required by the United State Constitution and the United States Supreme Court.

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APPENDIX TO REPLY TO BRIEF IN OPPOSITION

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Narrative of Hearing of May 19, 1997 Before
Commissioner Kimberly Prochnau ..... A60 -A85

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR KING COUNTY

In Re Parenting Plan for Dominick May-Douglass	)
	)
ROBERT JOSEPH MAY, Petitioner	) NO. 94-5-03704-9 SEA
	)
	) NARRATIVE OF
vs.	) HEARING OF MAY 19,
	) 1997 BEFORE
DESIREE LUANA DOUGLASS	) COMMISSIONER
Respondent	)KIMBERLY PROCHAU

INTRODUCTION AND BACKGROUND

This Narrative presents a record of parties' hearing before Family Law Court Commissioner Kimberly D. Prochnau held on May 19, 1997. It is presented without the concurrence of respondent Douglass. It is presented as evidence and as a record of the hearing. Reference is made to this case's Appearance Docket (AD) and its Sub # and to case number 94-3-04567-2 Appearance Docket (AD 41 - Case 94-3-04567-2) throughout this narrative. For example, 12/30/1996 Petition for Modification of the Parenting Plan Order is referenced as AD 179 reflecting the case record Appearance Docket Sub #.

On May 19, 1997, Robert May (petitioner or May) and Desiree Douglass (respondent or Douglass) appeared before King County Family Law Court Commissioner Kimberly Prochnau for a scheduled adequate cause threshold hearing on May's December 30, 1996 Petition for Modification of Parent Plan. AD 179, 180.

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An adequate cause hearing was scheduled on 01/27/97 for May 19, 1997. AD 179B/Schedule of Case dated 01/27/97.

In March 1997, Douglass initiated actions for a Parenting Plan and Contempt proceedings against petitioner May. Douglass scheduled a hearing on those motions for April 28, 1997. Douglass failed to confirm the hearing and the matter was not heard. On April 28, 1997, using the previously filed documents including the failed Order to Show Cause motion, Douglass appeared before Ex Parte Court Commissioner Carlos Velategui to renew the action. The Douglass' actions were responsive action to the May's Petition for Modification of the Parenting Plan Order. AD 179. Noting petitioner's adequate cause threshold hearing was already scheduled for May 19, 1997, Commissioner Velategui set Douglass' two motions for May 19, 1997.

A hearing was held before Commissioner Kimberly Prochnau on May 19, 1997. Commissioner Prochnau allowed the parties 15 minutes and heard two Motions for Contempt (one by each party), Motion for Amended Protection Order (filed untimely by Douglass), Adequate Cause Showing (filed untimely by Douglass), Motion for Modify Parent Plan (filed untimely by Douglass), Motion to Dismiss GAL (Douglass), Motion to Appoint GAL (Douglass), Motion for Temporary Parent Plan (May), and Motion to Dismiss GAL (May).

Both parties' petitions for a finding of an adequate cause threshold were denied and the case was dismissed by Commissioner Prochnau. Petitioner May was found to be in contempt of court for failing to comply with the Parent Plan Order in the case. His residential schedule with his son Dominick was

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suspended pending the payment of GAL Caroline Davis $ 1800.00 and documented progress in Anger Management Therapy. *see* AD /Order on Family Law Motion dated March 19, 1997. The order was affirmed upon a motion of revision on June 20, 1997. The Superior Court refused to hear and denied May's Motion for a Stay pending the outcome of the appellate courts. AD 236A and AD 236B.

After the Notices of Appeal were filed in Court of Appeals, District 1 and served upon Superior Court and Douglass, Douglass moved the Family Law Court for an order modifying the Parenting Plan Order on the same basis that was denied on May 19, 1997 by Commissioner Prochnau and affirmed by Judge Sharon Armstrong.

On August 4, 1997, without a good cause showing or the best interest of the child showing, but based largely on the suspension of May's parenting plan residential schedule, Family Law Court modified the Parenting Plan Order by issuing an order allowing Douglass to move from the State of Washington to the State of California. *see* AD 220 /Order on Family Law Motion dated August 4, 1997. King County Superior Court Judge Joan DuBuque sitting in Family Law Court modified the law of the case and all trial court orders without the benefit of a trial or an Adequate Cause hearing pursuant to KCLR 94.04 and overruled the Order on Family Law Motion of May 19, 1997 affirmed June 20, 1997. Judge DuBuque refused to rule on May's motion to vacate contempt expressly stating that Family Law Court did not have the jurisdiction to overturn Judge Armstrong's decision affirming the Family Law Order.

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II. NARRATIVE REPORT OF HEARING OF MAY 19, 1997 BEFORE COMMISSIONER KIMBERLY D. PROCHNAU

2.1 Commissioner Prochnau opened the proceeding by stating to both parties that each had only fifteen (15) minutes to argue and respond to the matters before the court. May objected on the basis that pursuant to KCLR 94.04 he had asked the court for two hours to argue all the matters and had properly noted the request before Family Law Court administration. Commissioner Prochnau overruled the objection stating that the given time limit was adequate.

May renewed his objection stating the matter originally scheduled before the court was the Adequate Cause Threshold hearing for his properly noticed and scheduled Petition to Modify the Parent Plan Order. May noted that the issues of child custody and the residential schedule were of paramount importance and could not be successfully argued in fifteen minutes if he were to have to oppose Douglass' six motions place of calendar on April 28, 1997. May argued that the contempt proceedings had possible criminal sanctions, properly required criminal defense counsel appointment, that allowing only fifteen minutes to defend against contempt and oppose other motions while showing adequate and good cause for a trial on the matter of a new Parent Plan Order violated substantive due process protections of the state and federal constitutions.

Again, Commissioner Prochnau overruled May's objection stating the court would only allow fifteen minutes for all matters, arguments, responses, and rebuttal.

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May began his arguments.

2.2 The Matter of Adequate Cause for May's Petition to Modify Parent Plan Order. First, May argued that there was adequate cause for modification of the Parent Plan Order based upon his residential move to Oregon for employment. His move made the residential schedule impractical. Pursuant to RCW 26.09.060(4), there is a "substantial change in circumstances of either parent or of the child, without consideration of factors set forth in section (2), if the proposed modification is only a: (b) Minor modification in the residential schedule that... that make the residential schedule in the parent plan impractical to follow." May's move to Oregon for employment meets this requirement. It is impractical and financially impossible, at this time, for May to receive the residential time granted him due to his work hours and the distance he had to travel to take his residential time. The basis for a minor modification only requires a change of circumstances of either parent when the residential schedule becomes impractical. The father's move to Oregon for employment and his current work schedule make the residential schedule impractical to follow. The impracticality of the residential schedule gives the court an adequate cause threshold to modify the Parent Plan Order.

Second, May argued that there was adequate cause and good basis for a trial to modify the Parent Plan Order because the Parent Plan Order was void. May argued the Parent Plan Order was void for the following reasons:

There was no proper presentation of 1995 trial court

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orders and the findings of fact in violation of SuCR 52 and SuCR 54. Pursuant to Washington case law, a violation of court rules and procedures that results in a harmful error to the party or parties shall make court orders void. SuCR 60(b)-(d)

The Parent Plan Order was issued under Case Number 94-3-04567-2 on September 19, 1995, whereas all other orders were issued under Case Number 94-5-03704-9. May argued the court effectively severed the cases upon establishing the Parent Plan Order. There was no Findings of Fact to support the Parent Plan Order under its case number. Paternity was not established in that case and therefore the Parent Plan Order is unlawful. Paternity was established on September 27, 1995, nine (9) days after the Parent Plan Order was issued in the Judgment and the Order Establishing Paternity and Other Relief under Case Number 94-5-03704-9.

May argued that Judgment and Order is void on its face. The court knowingly issued Judgment and Order after using opposing party's Ex Parte correspondence to establish child support and a money judgment. The determinative use by the court of the Ex Parte correspondence concerning a financial accounting of opposing party without allowing response and rebuttal by May remained a violation of "due process clause of the constitution." RCWA Const. Art. 1, sec. 3. Use of the Ex Parte correspondence violates court rules, the Code of Judicial Conduct, and Rules of Professional Responsibility. A judgment entered in a proceeding not comporting with procedural due process is void. RCWA Const. Art.1, sec. 3. May cited In Re Marriage of Ebbighausen, 708 P.2d 1220, 42 Wash.App. 99 (1978) and reminded the court of appeals ruled that the "procedural elements of state constitutional

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guarantee of due process are noticed and the opportunity to be heard and defend before a competent tribunal in an orderly proceeding adapted to nature of the case." The establishment of that Judgment and Order, a money judgment, based upon an ex parte correspondence between the opposing counsel and the court violates due process protections and court process and procedure protections. May argued he was not given any opportunity to respond to or correct the opposing party's erroneous information and testimony provided by ex parte correspondence. Since the court used that correspondence to establish the Judgment and Order to grant other such relief including child support vexing the rights of May, the Judgment and Order is void. Consequently, pursuant to SuCR 60, the dependent Parent Plan Order that is notably filed under a different case number is also void and unenforceable.

Accordingly, these arguments present a threshold for adequate cause of a substantial change of circumstance and give good and adequate cause for a trial on the matter pursuant to RCW 26.09.260.

Continuing his arguments on the voidability or voidness of the 1995 trial court orders, petitioner May pointed out that the terms of the Parent Plan Order and the Order Appointing the Guardian ad litem are in conflict. The terms of the conflict in the law of the case are such that it ought to have required the trial court to correct the errors. Specifically, the period of appointment for the guardian ad litem is different between the two court orders. Further, the Parent Plan Order is subjunctive and ambiguous with regards to the terms for increased residential with the father and anger management recommendations. The Parent Plan Order is too vague and too ambiguous to be valid.

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May continued this line of argument with his continuing objection to a guardian ad litem. May argued that the designation of a guardian ad litem after the trial, without good cause or a finding of fact to support such an appointment is unconstitutional. It is a violation of Washington State law (in this case, under Washington law, a guardian ad litem may only be appointed for the term of the court proceeding; and there must be a finding of fact to support the appointment . . . such a finding must support an action that must balance constitutional protections must be in the best interest of the child) and violations of the 14th Amendment of the U.S. Constitution for among other reasons it is an undue intrusion by the government into the private lives of citizens (violation of the right to privacy) and the costs were levied without proper due process (deprivation of liberty and property without due process).

Third, May argued that there was a substantial change of circumstances pursuant to RCW 26.09.260 and therefore further good and adequate cause threshold to proceed to trial or negotiated settlement. Pursuant to RCW 26.09.260, if there is "the basis of facts . . . that were unknown to the court at the time or the decree or plan, that a substantial change has occurred in the circumstances . . . of the non-moving party and the modification is in the best interest of the child and is necessary to serve the best interests of the child." The resignation of the court appointed guardian ad litem, Don Layton due to his ongoing conflict of interest, is in part, the basis for the "substantial change." The court relied heavily on the judgment, opinion, and report of Don Layton in this matter. Further, the court, based in part on the recommendation of Don Layton, ordered his

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appointment until Dominick obtained age twelve. It is Layton's conclusion that provided the court with the restrictions it imposed based upon "abusive use of intimidation." Unbeknownst to the court and to the petitioner, Don Layton had a conflict of interest and should and should have never been appointed to the case. By court order, Layton was expressly made a party to the case. His resignation removed a court party that was required to carry out the trial court orders and therefore there was a substantial change of circumstances. When Don Layton discovered and knew he had a conflict of interest, he should have resigned. Layton knew he had a conflict of interest at the time his investigation began. Layton knew he had a conflict of interest before the trial proceedings. He failed to disclose that conflict to the court and to the parties. He failed to disclose that he is the DSHS Child Protective Services Supervisor for the area in which the parties resided. That conflict certainly impacted his approach to the case. It impacted his findings. May emphasized the revelation that Layton had an ongoing conflict of interest impacted his presentation before the trial court. It affected the court. It harmfully affected the outcome of the trial.

Due to the conflict of interest between his official state duties, the State of Washington demanded Layton's resignation from the instant case. The effects of Layton's appointment and resignation have created considerable harm to the case. Don Layton's involvement in this case has resulted in a harmful error by the court in deciding this matter. It is on the basis of Don Layton's appointment and then post-litigation resignation that a substantial change has occurred. Layton was effectively a "party" to the entire paternity and parent plan proceeding. His testimony and his report heavily influenced the court in this

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matter. His input and services cannot be substituted without further prejudicing the case. Layton's resignation must be considered a substantial change of circumstances relative to the child and the custodial parent. Because of Layton's overall impact on deciding the case and the current impact that now includes the Family Court's decision concerning Contempt of Court, Layton's resignation provides an adequate threshold.

May argued citing Timmons v. Timmons, 617 P. 2d 1032, 94 Wash.2d 594 (1980) and court rules that a custody decree may be modified on the basis of facts unknown to the court at the time of decree to moderate *res judicata*, whether or not the decree has been contested, due to public interest in the welfare of the children. In accordance with SuCR 60 (b), subsections (1) through (6), the Parent Plan Order may be vacated. Layton's conflict of interest was unknown to the court and the parties prior to and at the time of the decree. Layton's resignation and dismissal by the court is a substantial change of circumstances affecting the child and both parties. The court made Layton an integral part of this matter.

2.3 The Matter of Contempt of Court Against May. May argued that he was not in Contempt of Court because he did not manifest the intent to violate a court order and that the parties had reached an informal, verbal agreement regarding Dominick's stay with May in Oregon for one extra day. Further May asserted that the extra day was a make-up day for days loss due to Douglass' court sanctioned January 1997 thirty day Hawaiian vacation and her February 1997 California business trip which pre-empted Dominick's residential schedule visit with petitioner May. May further asserted that the residential schedule was impractical and that Douglass refused to

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negotiate a new residential schedule. May advised the court he had missed a day that was not made up due to Douglass' three week vacation in January 1997, and that Douglass' business trip violated the Parent Plan Order and caused the loss of a partial day. May asserted and showed that May maintained custody of Dominick an extra day without intent to deprive Douglass of custody, without the intent to interfere with custody and without the intent to show contempt of court.

2.4 The Matter of the Guardian ad Litem. May argued that pursuant to Washington case law, a guardian ad litem is a special guardian, appointed by the court to prosecute or defend, on behalf of an infant, or to represent an unborn person in pending litigation. As a special guardian, the guardian ad litem's duties are limited in scope. He or she has no powers or duties to appointment or after the case has been terminated. May cited North American Council on Adoptable Children v. Department of Social and Health Services, 739 P.2d 677, 108 Wash. 2d 433 (1987). By definition, a guardian ad litem is a special guardian appointed for the limited scope of representing the child in the matter until litigation terminates.

The guardian ad litem, such as attorney Ms. Caroline D. Davis cannot be employed for management case. The guardian ad litem's limited scope and limited term duties go to protect the best interest of the child before the court and before tribunal hearings. He or she has no powers or duties prior to appointment or after the case has been terminated. May again cited North American Council on Adoptable Children (NACAC) v. Department of Social and Health Services, 739 P.2d 677, 108 Wash.2d 433 (1987).

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May argued that in the instant case the guardian ad litem is not a guardian of a dependent or incompetent. In this instance, the child has two parents quite capable of properly and appropriately taking care of the child. Dominick is not a dependent child of the court or the state. The child's welfare and protection are not an issue. There is not finding of fact or actual fact to give the court discretion to appoint a guardian ad litem for Dominick until he obtains the age of twelve or the age of majority depending upon which 1995 trial court order is read. The guardian ad litem, Don Layton, who was not an expert witness and yet who was the architect for the Order Appointing Guardian ad litem was dismissed for an ongoing "conflict of interest" concerning this case and his State employee duties. May argued that although Washington case law grants the court "broad discretion" in child welfare matters it does not grant the court privilege to directly interfere in the constitutionally guaranteed right to privacy without good cause or a balancing of constitutional rights. May cited In re Marriage of Sheley, 895 P.2d 850 (1995), Marriage of Cabalquinto, 669 P.2d 886, 100 Wash.2d 324 (1983); Schuster v. Schuster, 585 P.2d 130, 90 Wash.2d 626, 632 (1978); Joslin v. Joslin, 274 P.2d 847, 45 Wash.2d 357, 364 (1954). Though trial courts are given broad discretion in matters concerning the welfare of children, the continuing appointment of the guardian ad litem is without foundation, unconstitutional and that order is void on its face for violation of both the state and U.S. Constitutions. May argued even allowing the "broad discretion" the court may take in matters regarding the welfare of children, the court has no reasonable grounds or tenable reasons to order a guardian ad litem be attached to this case for over nine years. There are no findings of fact, facts of law, or facts at

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issue that gives the court any discretion to order the appointment of a guardian ad litem for any period beyond the term of the trial. There are no special conditions or emotionally disturbed children involved in the case. The trial in this case ended in September 1995. The limited purpose of the special guardian terminated at that point. The law is clear on the matter of the appointment of guardians and guardians ad litem and their terms. The court does not have the discretionary power, in this case, to legislate new law. The restriction placed in the Parent Plan Order of this case is not enough to overcome the law. The protection and welfare of the child is not at stake. The court has no basis in fact, law, or on its Findings of Fact to impose itself in the lives of the parties post-trial unless the parties come before the court.

May argued that the restriction placed in the parent Plan Order at paragraph 2.2, pursuant to RCW 26.09.191 (3) that states "a. The father's conduct may have an adverse effect on the child's best interests because of the existence of the factors which follows. (1) The abusive use of conflict and intimidation by the parent which creates the danger of serious damage to the child's psychological development. This factor serves as a current basis for restrictions with respect to decision making and dispute resolution and serve to limit the frequency of exchanges of residential care" was without merit and allowed by mistake of trial court. May pointed out there is no basis under RCW 26.09.191 (3) for this restriction and there is no finding of fact to support this restriction. The Findings of Fact and Conclusions of Law in this case may be summarized as the father "is not accepting the [mother's] position that the relationship is over. Restraints and no contact are necessary until the father is able to address these issues in anger

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management" related to issues with the mother and not the children. May argued that Finding of Fact, as proposed by the opposing counsel is mitigated by the fact the mother also did not accept the position the relationship was over as evidenced in post-trial circumstances. It had no foundation considering the contentiousness of the parties. May argued that Finding of Fact does not meet any element of RCW 26.09.191 including RCW 26.09.191 (3) (e). Nothing in the Finding of Fact or presented in trial supports the contention that "there exists or existed the abusive use of conflict by the parent which creates the serious danger to the child's psychological development." Statements in the court adopted July 1995 GAL Report expressly stated otherwise.

May noted that during the trial in this matter, the court and the guardian ad litem both focused on the mother with regard to the use of "abusive intimidation." The "protection of the child was not and has never been the issue." Don Layton, the guardian ad litem through December 30, 1996, stated in his report to the court dated July 2, 1995 and during trial that the mother is incapable of keeping boundaries with regard to the father and therefore needs the assistance of the court. Don Layton recommended to the court during trial he be appointed the guardian ad litem to maintain this boundary. The court concurred. Over the adamant objections of the father and based upon its discretion, the court appointed Don Layton guardian ad litem. Don Layton's appointment was to last until Dominick obtained the age of twelve or the age of majority, depending upon which trial court order is read. The Findings of Fact support the assertion that the guardian ad litem was appointed to "protect" the mother, apparently from herself. In no way does that directly reflect on the welfare nor the

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psychological development of the child or any child in this case as there are six other children involved in this matter.

May argued the guardian ad litem should not have been continued after the case terminated on that basis or any other basis except dependency or incompetency. There is not basis for the continuation of the guardian ad litem. In this case, Don Layton stated in open court that he was biased in favor of the mother. Layton stated he intentionally slanted his report to the court to ensure the father stood no chance of receiving custody. His stated bias demanded that the court could not have envisioned the guardian ad litem to be an arbitrator between the parties or a case manager. The guardian ad litem was appointed to "protect the mother" and ensure the recommendations of the court with regards to the father were overseen. May argued it is not up to the court to legislate or interfere in the private affairs of family after trial. The court must show a basis in law to insert itself into the family once a case has terminated. This is a Constitutional guarantee and right that should not be trampled upon by some vague or omnipotent concept named "the discretion of the court." The reason for the discretion must be stated clearly and strongly backed by case law. In this case, the "discretion of the court" is an abuse of judicial power. The court does not have a basis for discretion in this case. Considering the resignation and dismissal of the "architect" of this intrusion into private lives, the court ought to reconsider its judgment and rulings on the subject. Its Order Appointing Guardian ad Litem is untenable considering the facts and mounting facts of this case, is based upon reasonable and unclearly stated

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grounds, and violates, without balancing interests, Constitutional protections.

2.5 Opposition to Appointment of Caroline Davis as GAL. May argued that the appointment of Caroline D. Davis under Case Number 94-5-03704-9 is improper. Davis was appointed by Superior Court Judge Charles Johnson acting as Judge in Family Law Court. May argued that Family Law Court did not have jurisdiction over the guardian ad litem matter. The matter came before the Family Law Court in an earlier Contempt of Court action. It was improperly before the court in December 1996. That 1996 action of the court modified the 1995 trial court order in contravention of court procedure and process. May argued that the appointment of a GAL is under the jurisdiction of Superior Court as the order was signed by Superior Court Judge Sharon S. Armstrong. Though May objected to the Family Law Court (Judge Charles Johnson) deciding a matter without a proper summons and notice, Judge Johnson pointed out that he was a Superior Court Judge and could make such GAL appointments. Whether or not Judge Johnson could make such an appointment, under the circumstances is moot, he made the appointment. The appointment was made without presentation and the appointment process did not comport with court procedures. May argued that the 1996 appointment order was void on its face for failure of process and because it violated the law of the case and the doctrine of *res judicata*. Further, the action was, as Judge Johnson phrased it, a substitution of GALs and not a modification of the original court order failed for process and procedure. Judge Johnson's order, like Judge Armstrong's original order is void for failure of process, failure to comport with court procedures, and it violates both the state and the U.S. Constitutions.

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May cited to Esmieu v. Schrag, 548 P.2d 581, 15 Wash.App. 260 (1976) and Ebbighausen to support his argument and support his argument that there was adequate cause threshold.

2.6 Conflicting Orders and GAL Fees. May argued that Davis was one of the most expensive GAL's in the practice in Seattle and her fees exceeded the fees allowed by the trial court orders. May argued that *res judicata* did not allow the imposition of fees greater that $ 400.00. In the alternative, May again argued The Judgment and Order Determining Parentage and Granting Additional Relief was void on its face for failure of due process, failure to comport with court procedures, and failure of presentation, defines the "Future fees and costs" of the GAL. The order states, "Prior to any additional work being done by the guardian ad litem being done, each party shall pay an advance retainer of $200.00 a piece to be credit towards work done." The newly appointed GAL's advance retainer fee is $900.00 a piece. This well beyond the terms of the Superior Court Order and *res judicata* did not allow a change without further trial and a showing that moderation of *res judicata* ought to be allowed. That order had not been modified or amended. For Family Law Court to impose an order that the Petitioner pay $1800.00 is beyond the scope and jurisdiction of Family Law Court, particularly considering the current order. As that fee is not part of the trial court order, it is improper as a remedial sanction upon a contempt finding against May.

May continued to assert Caroline D. Davis does not have any responsibility under the current Parent Plan Order as GAL. May rightly observed no GAL has ever been appointed to the case. The Parent Plan Order is under the case number 94-3-04567-2. Judge Sharon

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Armstrong issued the orders under both cases in September 1995. May renewed his argument that the court effectively severed the cases again on September 19, 1995, after trial. The 1995 trial court granted Robert May, under the case he initiated to establish a parent plan, the two provisions he requested, a Parent Plan Order under the case he initiated and a guarantee that he shall always have a practical residential schedule with his son Dominick. The Parent Plan Order under case number 94-3-04567-2 was drafted and presented by opposing party to May. A guardian ad litem is appointed under case number 94-5-03704-9.

2.7 May's opposition Douglass' Motion for Amended Protection Order, Adequate Cause Showing, and Motion for Parent Plan Order. May argued all were improperly before the court and the Douglass had no legal basis to be granted any of the relief she requested.

2.8 May's argument for Contempt against Douglass. May argued the following:

Douglass was not on a business trip within the scope and meaning of the Parent Plan Order. The trip was a voluntary junket paid for by Douglass. The trip allowed her to visit her mother and job shop. The business trip was over prior to the commencement of May's residential schedule and that Douglass had adequate time to meet the Parent Plan Order commitment. Instead, she elected to stay in California and visit her mother at Pismo Beach (not on business) during the Saturday of May's scheduled residential time. May argued that Douglas failed to meet the requirement of the Parent Plan Order to give a timely 10-day notice prior to going on a business

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trip. May noted that the failure to give notice and the visit to her mother on Saturday when the business trip ended the prior Friday was intentional contempt of court.
Those violations in conjunction with Douglass' failure to negotiate a new residential schedule due to May's move to Oregon for employment, and Douglass' intentional and continuous frustration of the residential schedule showed contempt of court.

2.9 Douglass argues Contempt against May.
Douglass stated May kept Dominick until Sunday in violation of the Parent Plan Order. She provided evidence in support of the contention of a Seattle Police Department Report she initiated, a Tigard (Oregon) Police Department Report she initiated, and a report from Common Ground. She stated though May contacted her regarding the extended stay of Dominick in Oregon, she denied her agreement. She stated she did not communicate directly with May on the matter. Douglass stated that May made contact through letters and through Common Ground. Douglass stated that when she took Dominick to the train station with his brother Robert Michael May that she was aware that May did not intend to bring Dominick back on Saturday. Even so, she argued that she felt threatened that May would kidnap Dominick. Douglass testified regarding an alleged kidnapping by May of his son Albert and attempted to introduce evidence of an Oregon dissolution.

May objected on the basis that the evidence and testimony was hearsay. The court sustained the objection and struck the evidence. Douglass continued that she was afraid May would not return Dominick. May objected to the characterization and the testimony.

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May objected based upon foundation and no substantiating circumstances. May stated no threat was made written, or uttered to unlawfully take Dominick out of the State of Washington. That he was in constant communication and there was no basis for such an allegation. That he had other children and employment in Oregon and was not about to flee with Dominick.

The court overruled stating the argument went to Douglass' "state of mind."

Douglass argued May was in contempt of court for failing to meet the requirement of anger management counseling suggested by the trial court. Douglass spoke of a telephone conversation she allegedly had with Dr. Ganley. Douglass introduced a letter from Dr. Ganley of the Veteran's Administration.

May objected to the introduction of the telephone conversation and the letter on the basis of foundation and relevancy. The matter before the court was contempt for failure to return Dominick per the Parent Plan Order.

The court overruled that objection.

May renewed the objection on the basis of hearsay.

The court again overruled the objection, stating the letter was sufficient evidence.

May renewed the objection on the basis that the letter was in fact untrue and mis-characterized the situation. That he did not have prior notice of the letter and could not properly rebut the evidence. The

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letter and the concomitant telephone conversation were unsubstantiated hearsay. Neither evidence was an affidavit nor a declaration allowed by the court.

The court overruled the objection stating, in essence, the letter was sufficient "indicia of reliability."

Douglass testified that May refused to follow the requirements to use the intermediary service, Common Ground. She provided evidence in the form of letters from Common Ground.

May objected to the testimony and the evidence on the basis of foundation and relevancy.

The objection was ignored and not addressed.

May objected to the introduction of the letters from Common Ground as unsubstantiated hearsay.

The court overruled the objection.

2.10 Douglass argues Amended Protection, Adequate Cause, and Motion for Parent Plan. Douglass argued that May's move and her feelings that her would kidnap Dominick required heightened Protection Order and a Modification of the Parent Plan Order severely restricting May's residential schedule. Douglass argued she feared that there was not adequate adult supervision at May's home.

May objected on the basis of hearsay. The court ignored May's objection to the testimony and allowed Douglass to continue.

Douglass offered testimony about May's alleged involvement with Child Protective Services and offered

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a letter from Don Layton to substantiate her testimony.

May objected on the basis of relevancy and hearsay. The disclosure by Don Layton of any activity by CPS is a violation of the law. May argued the report to CPS was disregarded as untrue citing ER 403, ER 802.ER 402. That the report was made by Douglass a self-serving false evidence.

Again, the court ignored May's objection and allowed Douglass to continue.

2.11 Court intervention on Douglass behalf. At the end of Douglass' fifteen minutes, the court noted that Douglass had not defended against the allegations of Contempt against her. The court allowed her another minute to plead her case.

2.12 Douglass defending against Contempt of Court. Douglass stated that she did not have time to prepare a defense. She stated she had only received notice the previous Tuesday.

2.13 Court's immediate response to Douglass' defense against Contempt. Court questioned May as to if he sought an order to show cause hearing. May stated no. A hearing had been established. His motion for contempt against Douglass was both a responsive pleading to her motion for contempt and ancillary to the hearing. As proper notice was given, no Order to Show Cause Hearing was required in compliance with KCLR. The court disagreed and immediately dismissed the contempt motion against Douglass and did not allow any of the testimony regarding the matter to stand.

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2.14 The Court's findings, decisions, and order on Douglass' Motions. The court denied Douglass written motion for dismissal if Caroline D. Davis, stating Commissioner Prochnau knew Caroline Davis, but did not know Sandy Belcher. Commissioner Prochnau's knowledge of Davis was adequate cause to deny both parties' motions concerning the GAL. The court denied Douglass' Motions for Amended Protection Order, new Parent Plan Order, and Adequate Cause Showing as having no basis in law. The court found for Contempt against May. The court stated May was in contempt the Parent Plan Order by not following the provisions regarding the intermediary, Common Ground and for not complying with the residential schedule and he showed no evidence that a formal written agreement had been made. Without a written agreement, May's action were violation of the residential schedule and therefore contempt of court.

May objected to the finding and stated that the requirement for the intermediary Common Ground had expired in February 1997 and that there was therefore no basis for finding contempt for a March 1997 action that appeared not to comport with the Parent Plan Order.

The court took judicial notice and re-framed its statement saying May had frustrated the Parent Plan Order by not properly using the intermediary. The court further stated that May was not following the Order regarding anger management counseling and parenting class.

May objected stating that the purpose of the contempt hearing only had to do with one weekend and an extended stay. Further, he had completed over ten

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months of anger management training and over 60 hours in a parent class.

The court responded May would have to prove it by providing evidence of satisfactory progress to the GAL, Caroline D. Davis.

May objected to that because it was not the basis for the hearing and the continuing appointment of the GAL was improper and unlawful.

The court responded it has broad discretion in the matter.

May reminded the court it had limited jurisdiction as it was Family Law Court and a trial court order was already in place thereby making such action violative of the doctrine of *res judicata*. The appointment of Caroline Davis, considering her fees, was an improper modification of a Superior Court order, if that order was not deemed void.

The court heard and noted the objection and stated that the appointment of Caroline D. Davis would be affirmed anyway.

Again, May stated Family Law Court did not have jurisdiction in the matter.

The court found that May did not have a written letter of agreement from Douglass regarding the one-day extended stay of Dominick in Oregon and therefore found contempt on that matter.

2.15 <u>The Court's findings, decisions, and order on May's Motions</u>. The court found that May did not have adequate cause for a modification due to substantial

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change of circumstances. The court found that pursuant to SuCR 60, May had up to one year to appeal. As he did not appeal within a year, the matter was adjudicated and there was not basis to void the court orders. The court refused to address May's motion for modification of Parent Plan based upon his move and the impracticality of the residential schedule. The court stated that until May showed the court the progress through the GAL, his residential schedule would be suspended. And, until such time the progress is shown, it will not rule the "minor modification." The court ordered the Order for Schedule dismissed. The court denied the motion for the temporary parent plan. The court dismissed the Motion for Contempt against Douglass.

Commissioner Prochnau closed the proceedings.

The foregoing Narrative is presented as an accurate representation of the proceedings of the Family Law Court Hearing of May 19, 1997 in lieu of a transcript or other record as none apparently exist. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of October, 2000.

s/Robert May
Robert May
Petitioner, Pro Se

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